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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUY QUOC NGUYEN, Defendant and Appellant.	G040190 (Super. Ct. No. 06WF1567) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed as modified.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Huy Quoc Nguyen was convicted of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a); all further statutory references are to this code unless otherwise stated). The jury found defendant discharged a firearm while committing the crime (§ 12022.53, subd. (d)) and committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)). He was sentenced to seven years to life for the attempted murder and a consecutive 25 years to life for the gun enhancement. The court struck the requirement of section 186.22, subdivision (b)(5), which states that when there is a true finding a defendant committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) he will not be eligible for parole until having served at least 15 years.

He appeals on several grounds: 1) erroneous admission of testimony by a gang expert; 2) insufficient evidence of premeditation; 3) prosecutorial misconduct; and 4) cruel and unusual punishment. The Attorney General argues the sentence for the attempted murder was incorrect. We agree and modify the sentence accordingly. Otherwise the judgment is affirmed.

FACTS

In the period before the day of the incident defendant associated with his cousins, Billy and Tam Troung; Tam was a member of the Viet Boyz street gang. When the gang formed in Westminster as an offshoot of the San Diego based Viet Boyz, they initially called themselves the Tiny Viet Boyz but soon eliminated the term Tiny; another name by which the gang was known was V Boyz. (Unless the context requires otherwise we will refer to this gang as V Boyz.)

On the evening of the shooting defendant and his cousins were drinking with Alex Phu, Johnny Nguyen (not related to defendant), and several others, who were all members of or affiliated with the V Boyz, at Phu's house. Defendant showed the

group his gun. According to Billy defendant "always had [the gun] with him." The group went to a club and then decided to go to a taco shop and left in three cars. Johnny's car arrived first and the occupants got into an argument with Michael Laban and Justin Jauregui.

One of the V Boyz asked Laban where he was from and which gang he was in; Laban denied being in a gang. Jauregui either hit or tried to hit one of the V Boyz, after which Johnny hit him in the head with a flashlight. Johnny called Tam, who was riding in the same car as defendant, driven by Billy. Johnny told Tam he and the V Boyz were in a fight at the taco shop and needed backup. Billy's car arrived within a few minutes; the third V Boyz car was already there.

Upon arrival defendant got out of the car with his gun drawn. He fired his gun at Laban while he was backing away. When Laban and Jauregui turned to run, defendant chased them, firing his gun at least six more times until he ran out of bullets. He hit Laban in the back twice and once in the hand. During the incident, Phu yelled, "V Boyz." Defendant and the others fled after the shooting.

Once Tam was identified as one of the suspects, police records confirmed he was a gang member. When his house was searched police found weapons and ammunition, and photographs of Tam with other V Boyz displaying gang signs. After Tam and Billy were arrested for attempted murder, Billy disclosed that defendant fired the gun. Billy and Tam both admitted committing the crime to benefit their gang. Tam pleaded guilty to being an active member of V Boyz and committing "a crime related to the shooting" and Billy pleaded guilty to being an accessory after the fact.

When defendant was first interviewed by the police he denied any knowledge of the shooting. This persisted even after the detective told him witnesses had identified him as the shooter and also that police had found the gun he had used and watched surveillance tapes showing him shooting.

Defendant denied being in the gang but told the detective he had "hung out" with the V Boyz when he was in high school and had been known as "Weasel." He also said the V Boyz had "backed [him] up" during that time. He said Tam was a long time member of the V Boyz, had many enemies, and believed he was in danger. He admitted that on the night of the shooting he had gone out with Billy, Tam and Tam's friends; he knew most of them belonged to V Boyz. He confirmed that while they were on the way to the taco shop someone had called Tam, saying they were in a fight and "surrounded."

He had the gun because it was "dangerous out there." When they arrived at the taco shop, holding the gun behind his back, he got out of the car to "mellow everybody back." A big man approached and seemed to be pulling a gun from his waistband; he heard someone yell, "[H]e['s] got a gun." Defendant pulled his own weapon and shot it a couple of times, in self-defense, to scare the man away; he did not run toward him. He did not realize he had hit anyone. He ran from the scene because he knew Tam was a gang member and he did not want to be charged with committing a gang shooting. Originally he said no one knew he had a gun that night but when the detective said police knew he had showed it to Tam and Billy, defendant admitted he had done so because they were going to a shooting range.

At trial Detective Tim Walker, who was one of the investigating officers, testified as a gang expert. As to Asian gangs, they usually do not have a territory but are "mobile," leading them to frequent affiliations with other gangs with whom they commit crimes. Their mobility leads to more conflicts with other gangs. About half of the members do not advertise their membership with tattoos because they lead "double li[ves]" where many of their family members do not know of their affiliations. Gangs usually share their guns and discuss who currently has possession and where the guns are hidden.

Before engaging in violence, gang members often "claim" their gang and ask opponents what gangs they "claim." Members "claim" the gang by flashing the gang's sign or calling out its name. Respect is an important component of Asian gangs and disrespect requires retaliation, which often includes use of a gun. Failure to retaliate can be seen as weakness.

Gangs commit crimes for monetary reasons and violent crimes to bolster their reputation. Members earn respect or enhance their reputations by committing the crimes or "backing up" other gang members. Gang members will engage in criminal activities with nonmembers if they are family members or are otherwise trusted.

Walker, who had been a gang detective for four and a half years, had had "hundreds if not thousands" of conversations with gang members. He was familiar with V Boyz, having spoken with about 30 members, including Phu and Tam. He believed there were between 15 and 20 active members at the time of the shooting. Assault with a deadly weapon is one of their primary activities.

Having spoken to Phu several times, Walker knew he belonged to the V Boyz because Phu had admitted membership. Walker had searched his residence and found gang-related material. He had also investigated gang cases in which Phu was involved. Tam had told him he was a member of V Boyz as well. Walker had participated in the search of Tam's house where V Boyz paraphernalia were found. Walker also found V Boyz's names and phone numbers in Tam's cell phone and gang symbols on items found in his car. Walker knew Johnny was a long-time member of V Boyz. His name and phone number were in Tam's cell phone.

In a hypothetical question containing the facts of the shooting and the information as to Phu's, Tam's, and Johnny's membership in V Boyz, Walker opined the crime was committed for the benefit or at the direction of or in association with the gang. The parties stipulated V Boyz was a criminal street gang.

Additional facts are set out in the discussion.

DISCUSSION

1. Confrontation Clause Claim

Defendant asserts the court violated his Sixth Amendment right to confrontation as explicated by *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) by allowing Walker to testify defendant was an active gang member when he committed the offense. Specifically, defendant refers to the conversations Walker had with V Boyz members to form that opinion, noting that because none testified, the statements were inadmissible hearsay. He also challenges Phu's and Tam's "purported admissions, confessions and guilty pleas" about which Walker also testified.

Under the confrontation clause in the Sixth Amendment an accused has the right to confront all witnesses against him. (U. S. Const., 6th Amend.) In *Crawford*, the United States Supreme Court held the confrontation clause barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra,* 541 U.S. at pp. 53-54.) But it also stated "[t]he Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Id.* at p. 59, fn. 9.)

"As our appellate courts have repeatedly found consistent with the Supreme Court's Sixth Amendment precedent: 'Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.' [Citations.] 'The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. [Citations.]' . . . [A]dmission of expert testimony based on hearsay will typically not offend Confrontation Clause protections because 'an expert is subject to cross-examination about his or her

opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.' [Citation.]" (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154.)

Thus under established law Walker's opinion, even if based on testimonial statements, did not infringe on defendant's confrontation rights. Nevertheless, defendant seems to argue that Walker's testimony is inadmissible because current case law is not consistent with the intent of the framers of the Constitution. We rely on existing precedent, not some undeveloped theory of original intent.

Taking a different tack, defendant asserts that admission of the evidence is not harmless error. Because there was no other evidence the shooting was gang related, the prosecution could not have proved that element without Walker's testimony. This argument also fails. Because it was not error to admit it in the first place we have no need to engage in a harmless error analysis.

Further, while expert testimony alone is not sufficient to prove the shooting was gang related, Walker's testimony was "coupled with other evidence from which the jury could reasonably infer the crime was gang related." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) Billy testified Tam belonged to the V Boyz and that he understood the others at the taco shop were members as well. The detective who interviewed defendant also testified as to defendant's admissions regarding his version of the events, including his knowledge that Tam and his friends were gang members and that he had associated with V Boyz when he was in high school. The jury also saw the video of the interview. In addition, defendant testified about the call to Tam regarding the fight at the taco shop. Further, Phu shouted "V Boyz" during the altercation.

Moreover, Walker testified about his personal knowledge of gangs, including the V Boyz, Tam, Johnny, and Phu. And the parties stipulated V Boyz was a street gang. The jury also heard of the gang paraphernalia recovered when Tam's and

Phu's homes were searched. This was sufficient for the jury to find this was gang activity and that defendant's acts were in association with, for the benefit of, or at the direction of a street gang. (§ 186.22, subd. (b)(1).)

Finally, the court instructed the jury it could not consider hearsay evidence on which Walker based his testimony by giving CALCRIM Nos. 303 (restriction on evidence admitted for limited purpose) and 360 (limited admissibility of hearsay underlying expert's opinion).

There was no confrontation clause violation. Because there was no error in admitting the evidence, there is no ineffective assistance of counsel for failing to object.

2. Expert Opinion Crime Was Gang Related

Attacking from a different angle, defendant claims Walker's opinion the shooting was to promote or assist V Boyz's criminal activity was improper because it infringed on the jury's role to make findings of fact and was based on inadmissible hearsay.

"The use of expert testimony in the area of gang sociology and psychology is well established. [Citations.] The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.] Such evidence is admissible even though it encompasses the ultimate issue in the case. [Citations.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371.) Subject to the trial court's discretion, "an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth[]' [citation]" if the "question [is] rooted in facts shown by the evidence," or where the opinion is "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v.*

Gardeley (1996) 14 Cal.4th 605, 618.) "'[B]ecause an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment.' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) It is common for experts to rely on reports from officers detailing other gang-related events. (E.g., *People v. Gamez* (1991) 235 Cal.App.3d 957, 967, disapproved on another ground in *People v. Gardeley, supra,* 14 Cal.4th at p. 624, fn. 10.)

As a preliminary matter, defendant failed to object to the questions or move to strike the answers to which he now objects, thus waiving the issue. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125-1126.) But even on the merits defendant has not shown the court abused its discretion in allowing Walker to give his opinion that defendant committed the shooting for the benefit of or in association with the V Boyz.

Defendant claims Walker's opinion, based on hypothetical questions, that defendant knew the men he was with were members of V Boyz and he committed the crime to benefit the gang, was merely testimony about defendant's subjective intent and knowledge, without foundation. He relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 where an expert testified that gang members know when one of them has a gun, thus giving them constructive possession of it. It was the only evidence presented to prove felony conspiracy to possess a handgun and "did nothing more than inform the jury how [the expert] believed the case should be decided," making it "an improper opinion on the ultimate issue." (*Id*. at p. 658.)

But here there was other evidence providing a foundation for Walker's opinion. Defendant admitted to police he was aware some or most of those he was with the night of the shooting were V Boyz and that they knew he had the gun. He testified to the phone call received while they were driving to the taco shop and that Johnny had told them of the fight and asked for help. Billy testified he knew defendant had the gun and

that once he arrived at the taco shop and got out of the car Phu screamed "V Boyz." This was sufficient for the jury to infer defendant committed the crime for the benefit of or in association with the gang.

Moreover Walker did not testify to defendant's subjective intent or knowledge or that the enhancement was true. He merely testified as to several of its elements. This "was not tantamount to an opinion of guilt . . . ." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 509.) His opinions were "beyond common experience" and helpful to the jury. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1371.) And the jury was instructed (CALCRIM No. 332) that they were free to disbelieve his opinion.

3. Insufficiency of the Evidence

Defendant asserts the evidence was insufficient to prove he acted with premeditation in the attempted murder. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) It is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Further, "[u]nless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135

Cal.App.4th 1152, 1162.) "'[I]f the circumstances reasonably justify the . . . findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

"[T]o prove an attempted murder charge, there must be sufficient evidence of the intent to commit the murder plus a direct but ineffectual act toward its commission. [Citation.] . . . [T]he evidence must demonstrate a deliberate intention unlawfully to kill a fellow human being. [Citation.]" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Often there is no direct evidence to prove intent so it "must be derived from all the circumstances of the attempt, including the putative killer's actions and words." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.) "[O]ur sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*Id.* at p. 946, italics omitted.)

In arguing the evidence was insufficient, defendant cites *People v. Anderson* (1968) 70 Cal.2d 15, which sets out three types of evidence that could support of premeditation and deliberation. These are facts about: 1) defendant's conduct before the attempted killing to show it was planned; 2) defendant's relationship with the victim that could show a motive; and 3) the particular method of the attempted killing to show a "'preconceived design.'" (*Id.* at pp. 26-27.) Defendant discusses numerous cases that relied on *Anderson* to find either premeditation and intent or lack thereof and compares those facts with the evidence in our case.

As noted by the Attorney General, "The *Anderson* factors provide a 'synthesis of prior case law,' but they 'are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case.' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 768.) Further "'*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate

court's assessment . . . . [Citation.]'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.) In any event, even using the *Anderson* analysis there was sufficient evidence.

As to planning, "[a]n intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Premeditation and deliberation do not require "any extended period of time." (*People v. Mayfield, supra*, 14 Cal.4th at p. 767.) "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*Ibid.*)

On the night of the shooting defendant took a gun with him when he went out to socialize with known gang members and showed the weapon to them. He was aware of the call during the drive to the taco shop that Johnny and others were in trouble and needed help. When he arrived at the taco shop he took the gun out from under the seat, got out of the car, and approached Laban with the gun drawn, and then shot him. When Laban ran, defendant pursued him, continuing to shoot, and hitting him three times, including twice in the back. This is sufficient evidence. In *People v. Wells* (1988) 199 Cal.App.3d 535, the court stated: "Although the record lends no support for the inference appellant targeted the victim prior to the events of that evening, planning could have begun moments before appellant fired a shot into the ceiling without disturbing the finding of premeditation and deliberation. [Citation.]" (*Id*. at p. 540.)

Moreover, in *People v. Morris* (1988) 46 Cal.3d 1, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, 545, fn. 6, the court held that defendant's taking a gun to the location of the shooting during early morning and then escaping showed he had "either a preconceived design to kill, or [was] fully prepared to do so," despite lack of a clear motive. (*Id.* at pp. 22, 23; see also *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [premeditation affirmed for the defendant who fired six shots at victim who was trying to escape]; *People v. Sanchez* (1995) 12 Cal.4th 1, 34-

35, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [finding of premeditation upheld for aider and abettor who went with principal to victims' home and, after hearing argument, entered residence and grabbed metal bar to beat victim]; *People v. Wells, supra*, 199 Cal.App.3d at pp. 540-541 [taking loaded gun to dance "consistent with intent to kill a rival gung member"].)

Evidence also shows motive. Defendant got out of the car with his gun to help Johnny and other gang members who had challenged Laban and Jauregui by asking where they were from. Further, "V Boyz" was shouted during the incident. Moreover, Walker testified the shooting would enhance the gang's reputation.

Finally, the manner of the shooting shows premeditation. When Laban ran after defendant's first shot, defendant chased him, shooting three more time, twice in the back. (*People v. Villegas, supra*, 92 Cal.App.4th at pp. 1224-1225 [premeditation shown where the defendant shot fleeing victim six times]; *People v. Wells, supra*, 199 Cal.App.3d at p. 541 [sufficient evidence of premeditation where, after firing one shot in air, defendant chased fleeing victim shooting him 3 times in back].)

4. Prosecutorial Misconduct

During closing argument, the prosecutor referred to an incident occurring several months after the shooting when, at the same taco shop, Phu displayed a gun and yelled "V Boyz." This information had come in only as part of the material on which Walker had relied to form the opinion V Boyz commit assaults with deadly weapons and that Phu was a member. The prosecutor argued this was corroboration of what happened the night of the shooting. Although the prosecutor denied arguing the evidence for its truth, the court sustained defense counsel's objection and immediately instructed the jury: "The last comment should not be considered by the jury for any purpose. The court is going to order it stricken from the record. [¶] The detective who would testify as an expert on gangs provided some information or some testimony about another event at the

[taco shop], but that information was provided as part of the expert's opinion that . . . Phu was a gang member, and also . . . as part of the expert's opinion regarding the activities of the V[] Boyz. [¶] It was not meant to establish that that . . . other event at the [taco shop] . . . actually occurred. . . . [T]here was no evidence of that fact, just that information was provided to back up the expert's opinion that . . . Phu was a gang member, and as to the activities of the V[] Boyz gang was not meant to establish that that . . . event actually occurred."

Defendant maintains this argument was improper for two reasons: it mischaracterized the actual evidence and it lessened the prosecution's burden of proof because there was no evidence aside from Walker's opinion about defendant's intent. As to the latter assertion, as discussed above there was ample other evidence from which the jury could determine intent. As to the first claim, defendant cannot show he was harmed by the statement.

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) In evaluating a claim of prosecutorial misconduct, "[w]hen a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 595.) "[A] prompt admonition by the court to disregard the statement is generally deemed to remedy the problem arising from improper argument by the prosecutor. [Citation.]" (*People v. Smith* (2009) 179 Cal.App.4th 986, 1007.) Here, the court immediately instructed the jurors they could not consider the prosecutor's statement for any purpose

and explained that the evidence to which he had referred was not admitted for its truthfulness. This was sufficient to cure any possible prejudice.

Defendant appears to argue both his state and federal constitutional rights were implicated by the comments. "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such '"unfairness as to make the resulting conviction a denial of due process."' [Citation.] By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and '"it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"' [citation]." (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Defendant has not shown either of these scenarios.

Further, the court instructed the jury with CALCRIM No. 222, which provides that nothing the prosecutor says during argument is evidence and CALCRIM No. 200, requiring the jury to follow the instructions. We presume the jury understood and followed the jury instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

5. Sentence

Citing several factors defendant contends his sentence of 32 years to life was cruel and unusual in violation of the United States and California constitutions and disproportionate to the severity of the offense. The Eighth Amendment to the United States Constitution "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' [Citations.]" (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108].) "A punishment violates the Eighth Amendment if it involves the 'unnecessary and wanton infliction of pain' or if it is 'grossly out of proportion to the severity of the crime.' [Citation.]" (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230.) The United States Supreme Court noted this principle is

"applicable only in the 'exceedingly rare' and 'extreme' case. [Citations.]" (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [123 S.Ct. 1166, 155 L.Ed.2d 144].)

"'"'A tripartite test has been established to determine whether a penalty offends the prohibition against cruel . . . [or] unusual punishment. First, courts examine the nature of the offense and the offender, 'with particular regard to the degree of danger both present to society.' Second, a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.] In undertaking this three-part analysis, we consider the 'totality of the circumstances' surrounding the commission of the offense. [Citations.]" [Citation.]' [Citations.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.) A defendant has a "considerable burden" to show a punishment is cruel and unusual (*People v. Wingo* (1975) 14 Cal.3d 169, 174), and "[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive [citations]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494).

Defendant admits he "made no showing that the challenged penalty is far in excess of that imposed in California for less serious crimes or for the same offense in other jurisdictions" (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1391), so we analyze only the first prong of the test, "the nature of the offense and the offender." (*People v. Villegas, supra,* 92 Cal.App.4th at p. 1230.)

Defendant acknowledges the shooting was "extremely serious" and that "only through sheer luck [was] someone . . . not killed." But he claims he just "'lost his head.'" He also points to his age, only 25, his lack of prior convictions and arrests, and his claim he has never been a gang member. He was educated and employed, with plans to become a police officer.

In support he relies on his own testimony that his first shot was meant to be a warning and when that did not work, he fired the remaining bullets, without even

realizing he was doing so. But other evidence, that after defendant fired the first shot he chased Laban and shot at him several more times and that defendant was not trying to stop a fight, contradicts this version of events. Defendant was an adult and there is no evidence he was immature for his age. Further, he possessed a gun and was familiar with its use and risks, having fired guns at a range. Upon arriving at the scene defendant got out of the car with the gun in hand, ready to use it. And the jury found he shot the victim with premeditation.

Defendant points out the trial court imposed the "'lowest sentence permitted by law,'" striking the requirement that he serve a minimum of 15 years before he was eligible for parole under section 186.22, subdivision (b)(5). The court did so because of mitigating factors, including the absence of a criminal history or gang membership, and the uncertainty of whether he was acting to benefit the gang.

But the court also commented on the "extreme seriousness of the crime" and observed that it was "clear" defendant was "acting in association with gang members," he "escalated" the incident "way, way beyond where it was before," and he shot "while the victim was running away," with "the bullets just miss[ing] the victim's spinal cord." It was "just chance that the victim was able to come in and testify" because "[h]e could just as well have been killed . . . ." The court further recognized "there was sufficient time for reflection . . . ." That the court reduced the time required for probation eligibility does not mean the sentence itself was disproportionate or cruel or unusual.

Defendant's argument also fails under *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 637], where the United States Supreme Court rejected a constitutional challenge to a sentence of life without the possibility of parole for a conviction of possessing 672 grams of cocaine. Clearly, shooting an unarmed victim in the back is far more serious than merely possessing a large quantity of a controlled substance. The length of prison sentences "is largely a matter of legislative prerogative," and defendant has failed to meet the "'considerable burden'" to establish

"his sentence was disproportionate to his level of culpability" under either the state or federal constitutions. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193, 1197.)

The Attorney General argues separately that the sentence imposed for attempted premeditated murder, seven years to life, was erroneous. We may review this despite the fact it was not raised in the trial court. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 190.) The correct sentence is life in prison with the possibility of parole after serving at least seven years. (§§ 664, subd. (a), 3046, subd. (a)(1); *People v. Jefferson* (1999) 21 Cal.4th 86, 90, 99.) The abstract of judgment shall be corrected to reflect this.

DISPOSITION

The judgment is modified to show that on the attempted murder count the defendant is sentenced to life in prison with the possibility of parole after serving at least seven years. Except as modified the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the new sentence and forward a certified copy to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.